IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-35

FRANK DU BOIS CHEW, SR. and
FRANK HARRY CHEW, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS AND ROCA

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July 12, 1976.

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Opinion Below

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on April 28, 1976. A timely petition for rehearing was denied on June 9, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Was the defendant deprived of his Sixth Amendment right to counsel when the Ninth Circuit applied a "farce and mockery standard" of assessing competency, in conflict with the "reasonably effective assistance of counsel" standard adhered to by other circuits of the United States Court of Appeals?

2. Where there is a decision which represents a radical departure from previous

law, which concededly has retroactive application to a case pending on appeal, does it violate the due process and equal protection clauses of the United States Constitution not to remand the appellate case to the trial court for determination of whether facts not developed at trial make the new decision applicable?

3. Under United States v. Demma, 523 F.2d 981 (9th Cir. 1975), does it violate the due process and equal protection clauses of the United States Constitution to require evidence of resistance to a criminal design as a precondition to the entrapment defense where the defendants assert that they have no guilty mens rea?

Constitutional and Statutory Provisions Involved

The relevant constitutional provisions and statutes are as follows:

1. U.S. Const. amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. U.S. Const. amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . ."

4. 18 U.S.C. § 371:

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment provided for such misdemeanor."

5. 18 U.S.C. § 1343:

"Fraud by wire, radio, or television. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

6. 18 U.S.C. § 2314:

"Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or pro-

mises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof -

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious

representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

Statement of the Case

The government's principal witness was Bruce Cooper, an English immigrant and convicted felon, who acknowledged that he had worked as an informant for various law enforcement agencies over a period of more than twelve years (T. 20-21, 648, 667). For this case the F.B.I. had paid Cooper between $900 and $1,100 "more or less" on the basis of the value of the information Cooper supplied (T. 623-24, 631).

Cooper's testimony and the balance of the government's case, taken in the light most favorable to the government, established that Cooper was contacted by Renouf and White, two English criminals (T. 25,

39), seeking Cooper's assistance in enlisting an American participant in a scheme the two men had devised. The scheme was to obtain a loan secured by bogus bills of lading for platinum to be shipped by sea from England to the United States. To perpetrate the fraud, the two men created various imitation shipping documents, certificates, and insurance documents. Instead of platinum, two cases of nails were shipped (T. 359), and the bills of lading were altered to describe this metal as platinum (T. 30).

Frank Chew, Jr. testified that he was approached by Cooper on behalf of White and Renouf about the possible purchase of a patent for a smelter smoke arrester which his father had developed (T. 674). There were transatlantic telephone conversations, then Renouf and White flew to the United States, where a transaction evolved in

which the Chews sold White and Renouf Europeon rights to the smoke arrester in exchange for the bills of lading.

After the Englishmen arrived in the United States, the Chews made a series of attempts to borrow money using the bills of lading, but they met with no success. According to Cooper, the attempts were in criminal complicity with White and Renouf. According to the testimony of the two defendants, although they transported altered securities in interstate commerce and committed acts which furthered the scheme to defraud, they themselves believed that platinum had been shipped and therefore lacked guilty mens rea. In the end, White and Renouf returned to England after the defendants had paid $1,900 to Cooper for their expenses (T. 708-09); the Chews alone were indicted.

Trial concluded on April 16, 1975,

and the defendants' trial counsel, Merrill W. Robbins, resigned in lieu of disbarment from the Arizona State Bar effective August 1, 1975 (Appellants' Opening Brief, Appendix). Robbins failed to file a motion for new trial and failed to object to evidence of irrelevant bad acts (T. 250, 253-54, 266, 310, 661). As the Court of Appeals found, defense counsel, despite contrary representations, failed completely to pursue questioning of F.B.I. Agent Gwinn about Cooper's motivation and bias (Appendix, p. 5a).

On appeal, the defendants conceded that the multiple failings of Mr. Robbins did not reduce their trial to a "farce or mockery," but urged the Court to reverse the convictions because they had not been furnished "reasonably effective assistance of counsel." The Ninth Circuit declined to adopt the "reasonably effective assis-

tance" standard, as evidenced by its adherence to Hayward v. Stone, 527 F.2d 256 (9th Cir. 1975). (See Appendix, p. 6a).

The case was on appeal at the time the Ninth Circuit announced its decision in United States v. Demma, 523 F.2d 981 (9th Cir. 1975), which holds that an admission of guilt is no longer a prerequisite to pleading the entrapment defense. The Court held that the defendants were entitled to consideration under Demma, but that the facts of the case did not bring the two defendants the benefit of the new decision:

> "An exhaustive reading of the transcript of the trial of the two Chews fails to reveal evidence of persuasion or inducement necessary in this case to draw the defendants into the commission of the acts charged. . . . ."
> (Appendix, p. 3a).

In their petition for rehearing, the defendants asked that their case be reman-

ded to the trial court for a determination of whether there was evidence available which would support an entrapment instruction under Demma. The motion was denied.

Reasons for Granting the Writ

I. There is a Split in the Circuits Over the Appropriate Standard of Competency of Counsel Under the Sixth Amendment.

In recent years, the First, Fifth, and Sixth Circuits have adopted a test of "reasonably effective assistance" to determine whether a defendant's right to counsel has been properly fulfilled. Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). In this case, by its reliance upon Hayward v. Stone, supra, the Ninth Circuit has reaffirmed its adherence, with other circuits to the traditional "farce and mockery" standard. There thus exists

an active controversy between the circuits on the appropriate means of evaluating a crucial Sixth Amendment right. The question is ripe for resolution by this Court.

II. The Question of Whether There Should be a Remand for a Factual Determination of the Applicability of Demma, Raises a Significant Due Process and Equal Protection Problem.

In United States v. Demma, supra, the court below held en banc that an admission of guilt no longer be a prerequisite for raising the entrapment defense. The rationale for the court's decision was that an individual could be entrapped into the actus reas of a criminal offense without possessing guilty mens rea. See Groot, The Serpent Beguiled Me and I (Without Scienter) Did Eat--Denial of Crime and the Entrapment Defense, U. Ill. Law Forum 254 (1973). The Demma court held that as a

prerequisite for the giving of an entrapment instruction, the requirement remained that there be affirmative evidence of lack of predisposition prior to the inducement to commit the crime. Demma, supra, at 984.

In this case, the Ninth Circuit Court of Appeals found that Demma was applicable, but held that there was insufficient evidence of lack of predisposition to require the giving of an entrapment instruction. The court denied the defendants' petition for rehearing which asked that the case be remanded for a factual determination on the issue of predisposition.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). It can only occur if the defendant possesses "an understanding of the law in relation to the facts,"

McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed 2d 418 (1969). The Demma decision, which was rendered after the defendants' trial, was without federal precedent. The defendants therefore cannot be charged with a knowing and intelligent waiver of their right to assert a Demma entrapment defense. Meadows v. United States, 420 F.2d 795 (9th Cir. 1969), cert. denied, 402 U.S. 948, 91 S. Ct. 1607, 29 L. Ed. 2d 118 (1971); United States v. Ingman, 426 F.2d 973 (9th Cir. 1970). Under such circumstances, it is not reasonable to expect that the defendants would have attempted to develop existing, specific evidence of lack of predisposition, nor that the court would have permitted such questioning. Where a new principle of law is announced and there is any question concerning how it should apply to the record below, the proper action is to

remand the matter to the trial court for a factual determination so that there will be a fair and complete record. See cf. Goldberg v. United States, 44 U.S.L.W. 1153 (U.S. Mar 30, 1976).

III. Due Process and Equal Protection Cannot Permit a Requirement That There be an Affirmative Showing of Lack of Predisposition as a Prerequisite for an Entrapment Instruction Under Demma.

Under pre-Demma entrapment law, the requirement of evidence of lack of predisposition made sense. The defense required a moral struggle. It required that a man predisposed to do good be persuaded by a government agent to overcome his scruples and commit a crime. But the entrapment defense after Demma does not necessarily involve moral struggle. Where defendants, like the Chews, assert that they lack guilty knowledge, they cannot logically

be expected to undergo a moral struggle before committing an act which they do not believe to be criminal. Demma's abolishment of the prerequisite admission of guilt carries with it an unavoidable abolishment of the predisposition test.

Consider two hypothetical situations in which the defendants admit the actus reas of a business related crime, but deny guilty scienter. In one instance, the government agent offers an apparently legitimate business opportunity with a reasonable prospect for good profits. Without hesitation, the businessman-defendant enters the transaction, thereby committing the actus reas of a crime. The entrapment defense is unavailable. In a second example, the government agent suggests a business transaction which appears equally innocent to a potential defendant, but in this instance the defendant has some hesitation

about entering the transaction based upon some unrelated business or personal concern (such as conflicting production deadlines or a planned vacation). Despite this initial, slight reservation, the government agent persuades defendant to enter the transaction. In this instance, according to the court below, an entrapment instruction would be appropriate.

In the end, whether or not the entrapment defense would be available where the defendant denies mens rea would thus depend upon trivial business and personal concerns, totally unrelated to the legitimate concern of the criminal law. In one instance, a man is not to receive the benefit of the entrapment defense because he entered an apparently innocent transaction without any reservation or hesitation. In the other, the entrapment defense will be available due to some hesitation based

not upon moral qualm, but upon a business or personal consideration. Under the law of this case, then, the availability of the entrapment defense becomes contingent upon happenstance.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

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Counsel for Petitioners

July, 1976.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appelle,	)	NO.
	)	75-2025
v.	)	
	)	MEMORANDUM
FRANK DU BOIS CHEW,	)	
FRANK HARRY CHEW, JR.,	)	
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the District of Arizona

Before: WRIGHT and SNEED, Circuit Judges, and WILLIAMS*, District Judge

Frank D. Chew, Sr., and Frank H. Chew, Jr., appeal from convictions of all four counts of a four count indictment charging conspiracy to commit an offense

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*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

against the United States, use of wire communication in foreign commerce to execute a scheme to defraud and the transportation in foreign commerce of forged securities in violation of 18 U.S.C. §§ 371, 1343, 2314.

We affirm.

Both Chew, Sr., and Chew, Jr., contend that the recent decision in United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc), entitles them to a new trial with an instruction to the jury on entrapment. No objections were made to the instructions given by the court and no instruction on entrapment was requested.

Demma does not modify the decisions in this circuit on the sufficiency of the evidence required to charge the jury on the issue of entrapment. 523 F.2d at 984 n.4. As this circuit has held, a material question of fact on the issue of entrapment is sufficient to require the instruction. United States v. Payseur, 501 F.2d 966, 971 (9th Cir. 1974). But this does

not mean a mere scintilla of evidence is sufficient:

> The slight testimony which we have held allows the issue of entrapment to go to the jury must still constitute some evidence of inducement or persuasion by the Government. (United States v. Christopher, 488 F.2d 849, 850-851 (9th Cir. 1973).)

An exhaustive reading of the transcript of the trial of the two Chews fails to reveal evidence of persuasion or inducement necessary in this case to draw the defendants into the commission of the acts charged. The informant Cooper testified to initial contacts with the Chews, whom he previously knew; Chew, Jr. had met co-conspirators Renouf and White previously and apparently was ready and willing to meet with them to consummate the scheme. The only suggestion that the Chews did not instigate this crime and were inveigled into committing these acts is in the final

argument to the jury by their counsel. But there is no evidence or testimony which would indicate any reluctance to participate on the part of the Chews nor any need for persuasion on the part of the informant Cooper.

Appellants further argue that Cooper's role in the crime[1/] was that of instigator, and that this amounts to entrapment. "Instigation is distinguishable from providing a favorable opportunity to break the law to one already and willing to do so." United States v. Demma, 523 F.2d 981, 984 n.3 (9th Cir. 1975). However, the facts and the testimony adduced at the Chews' trial show no more than the provision of a favorable opportunity to participate in

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1/ Cooper testified that he received a phone call from Renouf in London, with White on a second extension, in which Cooper was asked to put Renouf and White in contact with someone in the United States. Cooper thereafter apparently introduced Frank Chew, Jr., to Renouf and White.

the scheme which the co-conspirators had devised.

The Chews raise a number of other grounds for a new trial. They claim their attorney was not permitted to impeach Cooper's testimony by asking questions of special FBI agent Gwinn about Cooper's motivation and bias. See Hughes v. United States, 427 F.2d 66, 68 (9th Cir. 1970). However, the record before us shows that defendants' counsel was not prevented from questioning agent Gwinn, but that he apparently conceded the objection. (Reporter's Transcript 625-628.)

They also claim that the admission of the prior bad acts of co-conspirator Renouf in depositing bogus checks in various bank accounts to create activity in those accounts was prejudicial. Such action could well have been in furtherance of the scheme to defraud and their

admission was well within the proper discretion of the trial judge.

Frank Chew, Sr. individually argues that the evidence in the case is not adequate to support his conviction. There were references in the record to statements by Frank Chew, Jr., and to conversations between the Chews and Renouf, White and Cooper from which a jury could properly find that Frank Chew, Sr. knew that fraudulent bills of lading would be coming from England with Renouf and Cooper.

Finally, we find nothing in the record which indicates appellants were denied reasonably effective assistance of counsel. Hayward v. Stone, 527 F.2d 256, 257 (9th Cir. 1975).

The convictions are affirmed.